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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JEANETTE SCUZZARO,

Plaintiff and Appellant,

v.

LOMA LINDA UNIVERSITY MEDICAL
CENTER et al.,

Defendants and Respondents.

E032061

(Super.Ct.No. SCVSS57560)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher J.
Warner, Judge. Affirmed.

Donna Bader for Plaintiff and Appellant.

LaFollette, Johnson, De Haas, Fesler, Silberberg & Ames, Christopher Cannon
and David J. Ozeran for Defendants and Respondents.

After a 13-day trial, a jury awarded plaintiff Jeanette Scuzzaro damages in her
medical malpractice action. The damages included \$750,000 for past pain and suffering,

\$750,000 for future pain and suffering, \$100,000 for past loss of earnings, and \$302,178 for future loss of earnings. The latter figure was reduced to a present value of \$43,168.

During trial, the trial court granted defendant Yonemoto's nonsuit motion. In posttrial proceedings, the trial court granted the motions of defendants Petti and Umeda for judgment notwithstanding the verdict and for a new trial. Ms. Scuzzaro appeals.

FACTS

Ms. Scuzzaro went to Dr. Beckner, a dentist, in September 1996. At the time, she was age 52 and in good health. After some dental work, she was referred to Dr. Roberts, an oral surgeon. Dr. Roberts removed a lower left wisdom tooth and one other tooth in February 1997.

In March 1997, Ms. Scuzzaro felt some pain and noted a small red growth on her lower left inner jaw, near the place where the teeth had been extracted. She went back to the dentist and was given antibiotics, which were ineffective. By June, the extraction wound was healed, but the growth was the size of a BB, and her gum was swollen. Dr. Moss or his associate, Dr. Roberts, took a biopsy and forwarded the tissue to Dr. Melrose, a dentist specializing in oral pathology.

Dr. Melrose testified that he received the tissue and studied it. He also looked at an x-ray of the lower left jaw. He found malignant cells and diagnosed a primary squamous carcinoma. The diagnosis was "squamous carcinoma moderately differentiated." In lay terms, he found a malignant cancer tumor originating in the skin cells of the lower left jaw.

A primary issue in the case is whether the cancer had spread to the lower left jawbone or not. The technical issue is whether the cancer was properly staged as a T-2 or T-4 cancer. Staging is the “[p]rocess of classifying tumors, esp. malignant tumors, with respect to their degree of differentiation, to their potential for responding to therapy, and to the patient’s prognosis.” (Davis, Taber’s Cyclopedic Medical Dictionary (16th ed. 1989) p. 1738.) Although Dr. Melrose made the diagnosis, he did not stage the tumor. Instead, he notified Ms. Scuzzaro’s dentist.

Ms. Scuzzaro’s dentist referred her to defendant Petti, an oral surgeon at Loma Linda University Hospital, in June 1997. By that time, the tumor had grown bigger. Dr. Petti agreed with the diagnosis. Dr. Petti staged the cancer as a T-4 cancer which had invaded the jawbone. He told Ms. Scuzzaro that he would remove her left jawbone and replace it with bone taken from her leg, technically a fibula free flap. Plaintiff contends that the cancer should have been staged as a less virulent T-2 cancer and that her jawbone did not have to be removed.

Before surgery, Ms. Scuzzaro’s case was reviewed by a tumor board headed by Dr. Petti. The tumor board staged her cancer as a stage 4 cancer.

Surgery was scheduled in August 1997, but was subsequently advanced to July 18, 1997. Dr. Petti removed the jawbone and doctor Umeda reconstructed it with bone from Ms. Scuzzaro’s leg. The jawbone that was removed was lost during surgery and, as a result, it was not tested to determine if the cancer had invaded it or not.

The fibula flap failed four days after the initial surgery. A second flap failed in August 1997. Ms. Scuzzaro also developed a severe leg infection in August 1997. Defendant Yonemoto commenced radiation treatments in September 1997.

Other problems ensued. Ms. Scuzzaro eventually had a total of 18 surgeries on her face and eight on her leg.¹ Her last surgery at Loma Linda was in December 1998. Her new doctor, Dr. Scheer, did four further surgeries, beginning in April 1999.

At trial, in March 2002, Ms. Scuzzaro testified more surgeries were contemplated. In addition to the disfigurement caused by the removal and reconstruction of her jawbone, she had to obtain all her nutrition through a feeding tube and had to use a mouth spray because she has no saliva. Her normal life activities were severely curtailed, and she was unable to work. However, she had no recurrence of the cancer.

A rehabilitation counselor testified that Ms. Scuzzaro is permanently disabled and unemployable. She has problems with driving, walking and balance. She was having chronic pain and needs to rest and change position frequently. She has facial pain, speech problems and difficulties with memory and concentration. She has no saliva and has to hold her lip to make her speech clearer. Ms. Scuzzaro feeds herself through a tube in her stomach. She cannot take solid food and has difficulty in taking liquids. She will require several additional surgeries.

¹ Ms. Scuzzaro received 65 hyperbaric oxygen treatments, each lasting 90 minutes, to assist in the healing of the leg infection.

Ms. Scuzzaro also presented expert testimony to establish that her difficulties were the result of medical malpractice and not the cancer. We review this evidence in detail below.

THE TRIAL COURT'S DECISIONS

At the close of plaintiff's case, the trial court granted defendant Yonemoto's motion for a nonsuit. It found no evidence that Dr. Yonemoto or his radiation medical group breached any standard of care.

In posttrial proceedings, the trial court granted the motion of defendants Petti and Umeda for judgment notwithstanding the verdict. The court found that Dr. Petti was entitled to judgment because plaintiff's expert, Dr. Smith, testified that the cancer was a stage 4 cancer and that Dr. Petti's treatment of that cancer was within the standard of care. The trial court also found that Dr. Umeda was entitled to judgment because, even though two flap surgeries failed, there was no evidence that Dr. Umeda's reconstruction of the jaw was below the standard of care. Although the loss of the excised jawbone was below the standard of care, the trial court found that its loss did not affect the subsequent care and treatment of Ms. Scuzzaro.

The trial court also granted defendants' motion for a new trial on grounds of juror misconduct. The court found that juror declarations established bias and improper deliberations. Defendants contend the new trial order is not reviewable because plaintiff did not specifically appeal it.

STANDARD OF REVIEW

1. Nonsuit. “A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] ‘In determining whether plaintiff’s evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. . . .’ [Citation.] . . . [¶] In reviewing a grant of nonsuit, we are ‘guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.’ [Citation.] We will not sustain the judgment “‘unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.’” [Citations.]” (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

2. Judgment Notwithstanding the Verdict. “The trial court may grant judgment notwithstanding the verdict only if the verdict is not supported by substantial evidence. The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The court must deny the motion if there is any substantial evidence to support the verdict. [Citations.] This court therefore may uphold the order granting judgment notwithstanding the verdict, and affirm the judgment based thereon only if, reviewing all the evidence in the light most favorable to [plaintiff], resolving all conflicts, and drawing all inferences in her favor, and deferring to the implicit credibility

determinations of the trier of fact, there was no substantial evidence to support the jury's verdict in her favor. 'If the evidence is conflicting or if several reasonable inferences may be drawn,' the court erred in granting the motion and we must reverse. [Citation.]" (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72-73.)

We therefore must focus on the issue of whether substantial evidence supports the jury's verdict against Dr. Petti and Dr. Umeda. In a medical malpractice action, this means that the actions of the doctors were negligent because they were below the standard of care, and that the negligence caused the plaintiff's injuries. (See, e.g., BAJI Nos. 6.00, 6.00.1, 6.01, 6.36.)

3. New Trial Motion. The trial court's decision granting defendants' motion for new trial is reviewed deferentially. "The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of '[e]xcessive . . . damages' or '[i]nsufficiency of the evidence,' [Code of Civil Procedure] section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . or upon the ground of excessive or inadequate damages, . . . *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.*' (Italics added.) Thus, we have held that an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for

the moving party could have been reached’ [Citation.] In other words, ‘the presumption of correctness normally accorded on appeal to the jury’s verdict is replaced by a presumption in favor of the [new trial] order.’ [Citation.]” (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411-412.)

THE JUDGMENT OF NONSUIT AS TO DEFENDANT YONEMOTO

The trial court granted the nonsuit motion as to defendant Yonemoto at the close of plaintiff’s case because it found that plaintiff had failed to present evidence that Dr. Yonemoto or his medical group had breached any standard of care in providing radiation therapy treatments to Ms. Scuzzaro.

Plaintiff now contends that the trial court erred because there was substantial evidence that Dr. Yonemoto was negligent in administering the radiation therapy. She argues, without record citation, that the radiation therapy was started too soon, thus contributing to the failure of the second flap. She also argues that, if the initial surgery was unnecessary because the cancer had not invaded her jawbone, the radiation therapy for that cancer was also unnecessary.

We agree with the trial court that defendant failed to present any evidence to support the conclusion that Dr. Yonemoto or his radiation therapy medical group breached any standard of care. No radiologist testified to establish such a breach of the standard of care. Dr. Smith, a head and neck surgeon, limited his opinions to his field of

expertise. He did not impugn the radiation therapy.² On cross-examination he testified that the radiation therapy was appropriate and “crucial” if Ms. Scuzzaro had stage 4 cancer. Even if she did not have stage 4 cancer, radiation therapy is appropriate for some stage 2 cancers.

Dr. Scheer did not testify in his deposition to a violation of the standard of care relating to the radiation therapy, and he was therefore precluded from doing so at trial.

We agree with the trial court that plaintiff failed to present substantial evidence of a violation of the standard of care by Dr. Yonemoto or his radiation medical group.

Accordingly, Dr. Yonemoto’s nonsuit motion was properly granted and the judgment of nonsuit is affirmed as to Dr. Yonemoto and Loma Linda University Radiation Medicine.

THE JUDGMENT NOTWITHSTANDING THE VERDICT

As noted above, the trial court’s granting of the motions for judgment notwithstanding the verdict is reviewed to determine if substantial evidence supports the jury’s verdict against Dr. Petti, Dr. Umeda, the medical center, and the medical groups. In reviewing the trial court’s decision, we view the evidence in the light most favorable to plaintiff to determine if substantial evidence exists. We are not concerned with credibility determinations and we resolve evidentiary conflicts in favor of the plaintiff.

(Begnal v. Canfield & Associates, Inc., supra, 78 Cal.App.4th 66, 72.)

² In testimony which was stricken for lack of foundation, Dr. Smith said: “The initiation of radiation therapy in an area may or may not have been beneath the standard of care.” He agreed, however, that radiation therapy is generally begun within four to six weeks after surgery, regardless of the state of the healing of the wound at that time.

The question of whether there is substantial evidence to support the verdict is almost entirely dependent on an analysis of the testimony of Dr. Smith, plaintiff's expert. We therefore begin with a review of Dr. Smith's testimony.

Dr. Smith, a head and neck surgeon, examined plaintiff and reviewed the medical records, depositions, and other records relating to plaintiff's condition. He testified that the treatment of plaintiff fell below the applicable standard of care in several respects.

First, the excised jawbone was lost. Dr. Smith testified that preservation of the specimen was extremely important because it can be studied to determine the stage the cancer is in and the type of future treatments, such as chemotherapy or radiation treatments, that will be needed.

Second, a diagnosis of the tissue in the mandible should be made "to determine is this cancer in the jaw itself or does the cancer go to the jaw, but is not inside the jaw? That's without getting that, and then taking out the mandible, without a determination that there is cancer in the mandible, is a breach of the standard of care."

Third, a proper consent should have been obtained as to treatment alternatives: "If that was not provided, and in talking with the patient, her understanding was that consent was not given to [*sic*] her, then a lack of proper informed consent would be beneath the standard of care."

Fourth, Dr. Smith was critical of the staging of the cancer. If the cancer had not invaded the mandible, a stage 2 cancer diagnosis would have been appropriate. A stage 2 diagnosis would not require removal of the mandible. In other words, his examination of

the x-rays showed a radiolucency which might have been due to scar tissue from the wisdom tooth extraction, a cyst, granulation tissue or other things. Dr. Smith testified that a biopsy was needed to make a diagnosis of cancer in the jawbone. There was no such biopsy in this case to confirm that there was cancer in the mandible.

Dr. Smith was also critical of the use of a fibula free flap for the jaw reconstruction, although he testified that its use was not necessarily below the standard of care. He felt there were other procedures that were more frequently used.

On cross-examination, Dr. Smith testified that the use of a fibula free flap for reconstructing Ms. Scuzzaro's chin was within the standard of care. He conceded that, if the cancer was invading the mandible, Dr. Petti's treatment was within the standard of care. Dr. Smith also testified, in response to a hypothetical question, that a clinical staging of a stage 4 cancer would be within the standard of care under the facts known to Dr. Petti at the time of his diagnosis. In other words, if Ms. Scuzzaro had a stage 4 cancer, Dr. Petti's surgery was appropriate and within the standard of care. In such a case, the radiation therapy would also be necessary.

Finally, Dr. Smith conceded: "The only problem that I have had with [Dr. Petti's course of treatment] is a lack of frozen section diagnosis of what was going on inside the mandible. The mandible had the possibility of being cancer. And if that was the case, if cancer was invading the mandible, the procedure was appropriate. The radiation was appropriate as well, and the results were the type of results you see with that sort of problem. [¶] If it was not cancer, if it was a problem with chronic infection as a result

of, or which preceded the extraction of her teeth, a diagnosis of that could have been made with a biopsy through the tooth socket area lifting off cancer from around that area and determine is there a cancer in that hole anterior or is there no cancer in the hole. And that determination could have saved the lady her jaw.”

The cross-examination then concluded as follows: “[Question.] Well, Doctor, based on everything that you have reviewed, isn’t it your opinion to a medical probability that the cancer invaded the mandible? [¶] [Answer.] The probability is that it invaded the mandible, yes. [¶] [Question.] And presuming that to be the probability, if that were so, then Dr. Petti met the standard of care? [¶] [Answer.] Yes.”

In other words, Dr. Smith’s opinion was that a biopsy of the tissue inside the mandible would have been appropriate and, without proof that there was cancer in the mandible, the staging was incorrect, and the removal of the mandible was inappropriate. But the medical probability was that the cancer had invaded the jawbone, and if it had invaded the jawbone the treatment was appropriate.

Plaintiff’s other medical expert was Dr. Scheer, an oral surgeon who treated Ms. Scuzzaro after she left the Loma Linda doctors in April 1999. He agreed with Dr. Smith that the loss of the excised mandible was below the standard of care. The loss was significant because study of the removed bone and tissue aids the doctors in formulating a plan for further treatment. Dr. Smith also testified that excision of the condyle was below the standard of care, but it was not clear who removed it or when it was removed.

Dr. Umeda testified that it was still present during a surgery performed by Dr. Hendricks after Dr. Umeda and Dr. Petti had completed their operations on Ms. Scuzzaro.

On cross-examination, Dr. Scheer agreed with Dr. Smith that Ms. Scuzzaro had a cancerous tumor which had invaded her jawbone. At oral argument, Ms. Scuzzaro's attorney suggested that substantial evidence to support the jury's conclusions was found in Dr. Scheer's testimony. Review of that testimony does not support the contention. Although Dr. Scheer reviewed the reports which found a bone defect, he testified that the defect could be the result of the wisdom tooth extraction and the mandible should not have been removed without proof that the defect was due to cancer. But Dr. Scheer did not specifically testify that the cancer was improperly staged or that removal of the mandible was below the standard of care.

WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT?

A. Dr. Petti. The trial court and the parties agree that the loss of the gross specimen, i.e., the excised jawbone, was below the standard of care. Negligence was therefore established. However, the trial court found that causation was lacking. Although the trial court cited the testimony of Dr. Smith and Dr. Scheer, it concluded that "[t]here was no testimony from any witness that further evaluation of the cancer by virtue of the presence of gross specimen would have been beneficial in any sense, or would have altered the course of treatment which the Plaintiff received."

We cannot agree with this portion of the trial court's reasoning because there was such testimony. After stating there was no testimony on the subject, the trial court cited

the testimony of Dr. Smith that the loss of the specimen was important because it prevented study of the specimen to determine the stage of the cancer, whether it had invaded the jawbone, and to determine the future treatments needed. The trial court also cited Dr. Scheer's testimony that study of the specimen would be desirable in formulating a plan for future treatment.

Thus, both Dr. Smith and Dr. Scheer testified that loss of the excised jawbone impacted future treatment. Accepting this testimony, as we must, the inference is that the loss of the excised jawbone was significant. For example, if pathological study of the jawbone revealed that it had not been invaded by the cancer, different radiation treatments, or none at all, may have been appropriate. Dr. Smith was critical of the removal of the jawbone without prior laboratory confirmation of cancer in the jawbone, and he was equally critical of the lack of laboratory confirmation of cancer in the jawbone during and after surgery.

The trial court went on to find that the loss of the excised jawbone was essentially irrelevant, i.e., the loss did not cause injury to plaintiff. In reaching this conclusion, the trial court cited Dr. Smith's testimony that the cancer was a stage 4 cancer because there was a medical probability that the cancer had invaded the jawbone. If so, Dr. Smith testified that the treatment by Dr. Petti met the standard of care. In other words, the trial court found that "[t]here was no testimony from any witness that further evaluation of the cancer by virtue of the presence of gross specimen would have been beneficial in any sense, or would have altered the course of treatment which the Plaintiff received."

Dr. Smith stated that there was a medical probability that the cancer had invaded the jawbone. He also testified that, if the cancer had invaded the jawbone, Dr. Petti's treatment of the cancer was within the standard of care. In view of these concessions, and despite our disagreement with a portion of the trial court's reasoning, we agree with the trial court's conclusion that, although the loss of the excised jawbone was negligent, causation was lacking because there was no substantial evidence that loss of the jawbone caused plaintiff any injury. This is particularly true in view of Dr. Smith's conclusion that Dr. Petti's treatment of plaintiff was appropriate because the cancer had invaded the jawbone.

Plaintiff cites the testimony of Dr. Scheer that "the radiolucency seen on the X-rays in the area of the mandible was due to the recent extraction of Ms. Scuzzaro's wisdom tooth [*sic*]." The apparent reference is to the cross-examination of Dr. Scheer in which he reviewed the original biopsy report prepared by Dr. Melrose. Dr. Scheer first testified that the radiolucency area in the x-ray was the result of the extraction of plaintiff's wisdom teeth, not the tumor.³ But he was subsequently asked about the portion of Dr. Melrose's biopsy report which stated: "There's a poorly defined osteolytic lesion in the left ramus of the mandible which is partially expanded, which has partially expanded the bony structures." Dr. Melrose further stated: "By history, this represents a neoplasm." Dr. Scheer testified that a neoplasm is a growth and, in the context of the

present case, it was a cancerous tumor. Dr. Scheer thus agreed that there was a cancerous tumor in the jawbone. Since there was such a growth, the treatment by Dr. Petti was appropriate. Accordingly, the granting of the motion for judgment notwithstanding the verdict was proper as to Dr. Petti.

Plaintiff argues that “respondents never made a diagnosis that the cancer had invaded the mandible.” But Dr. Petti did make such a diagnosis. He diagnosed the cancer as a “squamous cell carcinoma, CA, left mandible.” He explained that the CT scan showed invasion of the jawbone by the cancer. He thought it was an aggressive stage 4 cancer and recommended removal of the jawbone.

In other words, we agree with respondents: “If cancer *did* invade the mandible, and the uncontroverted testimony was that to a reasonable medical probability it did, then an examination of the gross specimen would *not* have had an impact on the plaintiff’s treatment options.”

B. Dr. Umeda. The trial court found that Dr. Umeda was entitled to judgment notwithstanding the verdict even though two flap procedures failed because there was no evidence that his efforts to reconstruct plaintiff’s jawbone were below the standard of care.

Plaintiff disagrees and argues that “[v]arious acts of negligence were proven against Dr. Umeda.” No record cites are provided for the acts which are relied on by

[footnote continued from previous page]

³ Radiolucency is defined as “The condition or characteristic of being only partly penetrable by x-rays or other radiation.” (3 Schmidt, Attorneys’ Dictionary of Medicine, *[footnote continued on next page]*)

plaintiff but Dr. Smith testified that use of a fibula free flap was within the standard of care.⁴ He had no other specific criticisms of Dr. Umeda's reconstructive surgery. Dr. Scheer criticized various parts of the reconstruction, but did not opine that they were below the standard of care. Even if Dr. Scheer would not have done a fibula flap procedure, or he would have done it differently, these facts are not evidence of Dr. Umeda's negligence without expert testimony that the treatment which was given was below the standard of care.

We therefore agree with the trial court that there was a lack of substantial evidence to support the verdict against Dr. Umeda. Accordingly, the trial court properly granted the motion for judgment notwithstanding the verdict as to Dr. Umeda.

C. The Other Defendants. Since the motion for judgment notwithstanding the verdict was proper as to doctors Petti and Umeda, it was also proper as to their medical group, Loma Linda University Surgery Medical Group, and Loma Linda University Medical Center.

In view of these conclusions, we do not need to determine if the trial court properly granted defendants' motion for a new trial.

[footnote continued from previous page]
(Matthew Bender 1991) p. R-13.)

⁴ California Rules of Court, rule 14 (a)(1)(C) provides that each brief must "support any reference to a matter in the record by a citation to the record."

DISPOSITION

The judgment of nonsuit is affirmed as to Dr. Yonemoto and Loma Linda University Radiation Medicine.

The judgment notwithstanding the verdict is affirmed as to Dr. Petti, Dr. Umeda, Loma Linda University Surgery Medical Group and Loma Linda University Medical Center.

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HOLLENHORST

Acting P. J.

We concur:

GAUT

J.

KING

J.